Filed 3/30/04

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. ALAN SHAKHVALADYAN, Defendant and Appellant.	B165445 (Los Angeles County Super. Ct. No. GA046492)

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph F. DeVanon, Judge. Affirmed in part, reversed in part with directions.

A. William Bartz, Jr. and Carl A. Capozzola for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec, Supervising Deputy Attorney General, Russell A. Lehman, Deputy Attorney General, for Plaintiff and Respondent.

---

* Pursuant to California Rules of Court, rules 976(b) and 976.1, the portions of the opinion specified at pages 1-10 and 18 are certified for publication.

I. INTRODUCTION

Defendant, Alan Shakhvaladyan, appeals from his convictions for: false personation, count 1 (Pen. Code,[1] § 529); evading a pursuing officer with willful or wanton disregard for the safety of persons or property, count 2 (Veh. Code, § 2800.2); carrying a loaded firearm, count 4 (§ 12031, subd. (a)(1); and firearm possession, count 5 (§ 12021, subd. (a)(1). Defendant admitted that he had previously been convicted of two serious felonies. (§§ 667, subds. (b)-(i), 1170.12.) Defendant argues: there was insufficient evidence to support his convictions as to counts 1, 2, 4, and 5; his prior juvenile adjudication for attempted robbery does not qualify as a prior serious felony conviction pursuant to sections 667, subdivision (d)(3) and 1170, subdivision (b)(3); the trial court abused its discretion in refusing to strike one of his prior serious felony convictions; and the trial court erred in the calculation of his presentence credits. The Attorney General argues that defendant received an excessive award of presentence credits and the trial court should have imposed and stayed a $1,000 parole restitution fine pursuant to section 1202.45. In the published portion of this opinion, we conclude that there was insufficient evidence to support defendant's felony conviction for evading a peace officer in violation of Vehicle Code section 2800.2 as charged in count 2. As will be noted, we reverse the judgment in part and remand for purposes of limited resentencing.

II. FACTUAL BACKGROUND

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Osband* (1996) 13 Cal.4th 622, 690; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) Because defendant stipulated to

---

[1] All further statutory references are to the Penal Code unless otherwise indicated.

submit this case on the testimony contained in the preliminary hearing transcript, the facts are derived from that proceeding. On April 6, 2001, Glendale Police Officer Ronald Gillman arrested defendant for false impersonation following an investigation regarding a school fight. Defendant falsely identified himself as Saro Mirzkhanyan, but could not spell the name. While en route to the police station, defendant identified himself as Roman Tsarukyan. Defendant was subsequently accurately identified by his fingerprints.

On April 17, 2001, Glendale Police Officer David Gillispi cited defendant for being a passenger in an automobile without wearing a seatbelt. Defendant gave Officer Gillispi a thumbprint. However, defendant falsely gave the driver's license number and name of Saro Mirzkhanyan. Thereafter, on April 24, 2001, Mr. Mirzkhanyan filed a report indicating he was the victim of identity theft. Mr. Mirzkhanyan did not know defendant. Detective John Genna followed up on the identity theft investigation. On May 24, 2001, Detective Genna asked Officer Gillispi to review a photographic lineup in an attempt to identify the individual that used Mr. Mirzkhanyan's name. Officer Gillispi identified defendant's photo. Defendant was also identified as the person cited by the thumbprint he submitted on April 17, 2001.

On May 7, 2001, Glendale Police Officer Jon Harrison was working as a traffic enforcement officer on a motorcycle. While riding on Lexington Avenue, Officer Harrison saw a Mazda Protégé. The driver of the Mazda appeared to be violating the seatbelt and window tinting laws. Officer Harrison made a right turn followed by a U-turn. Officer Harrison pulled up behind the Mazda and activated his emergency front red and blue strobe lights and one solid red light. Officer Harrison attempted to pull the car over. The driver turned right and slowed the Mazda toward the right curb. Officer Harrison believed the driver was going to pull to the right curb to stop. However, the driver suddenly accelerated and drove off. Officer Harrison followed the Mazda, which was fleeing at speeds exceeding 60 miles per hour. After turning right again, the driver moved to the left of stopped traffic at the next intersection and drove straight ahead through the red light. Officer Harrison lost sight of the Mazda for a few seconds.

Thereafter, Officer Harrison saw the Mazda make a jogging movement to the right of stopped traffic under a freeway overpass. The Mazda passed the other automobiles on the right in an extended lane. The Mazda stopped abruptly when it collided with another automobile. Defendant ran from the Mazda. Officer Harrison, who was riding a motorcycle, followed defendant. Officer Harrison ordered defendant to stop. Defendant ran into the bushes alongside the freeway. Officer Harrison got off his motorcycle. Officer Harrison again ordered defendant to stop. Defendant came out of the bushes. Defendant had his hand in front of his waistband as though he was attempting to conceal something. Thereafter, Officer Harrison tackled and handcuffed defendant. Officer Gillispi arrived at the scene and helped place defendant into a patrol car. As soon as other officers took custody of defendant, Officer Harrison went to the bushes where defendant had been running. Officer Harrison found a handgun in the bushes. Officer Gillispi retrieved the handgun from the bushes. The handgun had a bullet in its chamber and a partially loaded magazine. The gun was later discovered to have been stolen from a deputy sheriff's car in April 1996.

At the time defendant was booked, a search of his person revealed four credit cards in his front pants pocket. The cards were subsequently determined to either be counterfeit or reencoded. When questioned, defendant said he had found the credit cards on a table outside McDonald's on the day he was arrested. Defendant had previously been convicted of robbery and theft in Nevada.

III. DISCUSSION

[The heading for part III (A) and III (A)(1) is deleted from publication.]

A. Sufficiency of the Evidence – Felony Evading

1. Evading a pursuing officer

[The remainder of part III (A)(1) is to be published.]

Defendant argues that there was insufficient evidence to support his conviction for felony evading a pursuing officer in violation of Vehicle Code section 2800.2, as charged in count 2. Vehicle Code section 2800.2, provides in pertinent part: "(a) If a person flees or attempts to elude a pursuing peace officer in violation of Section 2800.1 and the pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property, the person driving the vehicle, upon conviction, shall be punished by imprisonment in the state prison . . . ." Vehicle Code section 2800.1 sets forth the elements of flight from a pursuing peace officer: "(a) Any person who, while operating a motor vehicle and with the intent to evade, willfully flees or otherwise attempts to elude a pursuing peace officer's motor vehicle, is guilty of a misdemeanor if all of the following conditions exist: [¶] (1) The peace officer's motor vehicle is exhibiting at least one lighted red lamp visible from the front and the person either sees or reasonably should have seen the lamp. [¶] (2) The peace officer's motor vehicle is sounding a siren as may be reasonably necessary. [¶] (3) The peace officer's motor vehicle is distinctively marked. [¶] (4) The peace officer's motor vehicle is operated by a peace officer . . . and that peace officer is wearing a distinctive uniform. . . ."

In reviewing a challenge of the sufficiency of the evidence, we apply the following standard of review: "[We] consider the evidence in a light most favorable to

the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Mincey* (1992) 2 Cal.4th 408, 432, fn. omitted; *People v. Hayes* (1990) 52 Cal.3d 577, 631; *People v. Johnson* (1980) 26 Cal.3d 557, 576.) Our sole function is to determine if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia, supra,* 443 U.S. at pp. 318-319; *People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Marshall* (1997) 15 Cal.4th 1, 34; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Barnes* (1986) 42 Cal.3d 284, 303; *Taylor v. Stainer, supra,* 31 F.3d at pp. 908-909.) The standard of review is the same in cases where the prosecution relies primarily on circumstantial evidence. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11; *People v. Stanley* (1995) 10 Cal.4th 764, 792; *People v. Bloom* (1989) 48 Cal.3d 1194, 1208; *People v. Bean* (1988) 46 Cal.3d 919, 932.) The California Supreme Court has held, "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin, supra,* 18 Cal.4th at p. 331, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.)

Defendant argues that there was no evidence to establish: the motorcycle was distinctively marked; Officer Harrison sounded a siren on his motorcycle; and Officer Harrison wore a distinctive uniform. To begin with, the contention there is no substantial evidence Officer Harrison's motorcycle was not distinctively marked is without merit. Defendant argues that the only evidence presented in this regard was that Officer Harrison activated red and blue lights on the motorcycle. In *People v. Chicanti* (1999) 71 Cal.App.4th 956, 961-963, we held that evidence of the use of emergency lights and or a siren during a traffic pursuit was sufficient to establish the Vehicle Code section 2800.1, subdivision (a)(3) requirement that the peace officer's motor vehicle be distinctively marked. (*S*ee also *People v. Mathews* (1998) 64 Cal.App.4th 485, 488-490 ["red lights, siren, and wigwag headlights [on an unmarked police car] were sufficiently distinctive

markings to inform any reasonable person he was being pursued by a law enforcement vehicle"]; *People v. Estrella* (1995) 31 Cal.App.4th 716, 722-723 [police car need not have a visible insignia or logo to find it is distinctively marked within the meaning of section 2800.1].) In this case, the evidence demonstrated Officer Harrison, while assigned to traffic enforcement on a motorcycle, made a U-turn and drove up behind defendant. Officer Harrison activated his "front" red and blue strobe lights and a fixed red light and attempted to pull the Mazda over. Thereafter, it appeared that defendant was complying by pulling toward the right curb. Defendant then drove away in an effort to evade Officer Harrison. The totality of these facts constituted substantial evidence Officer Harrison's motorcycle was distinctively marked.

However, there was no substantial evidence that a siren was sounded or that Officer Harrison wore a uniform. Section 2800.1, subdivision (a)(2) requires the officer be using a siren. Section 2800.1, subdivision (a)(4) requires the officer be in a "distinctive uniform." Substantial evidence of all the conditions set forth in Vehicle Code section 2800.1, subdivision (a) must be presented in order to satisfy the felony provisions of Vehicle Code section 2800.2. (See *People v. Acevedo* (2003) 105 Cal.App.4th 195, 198-199; *People v. Chicanti, supra,* 71 Cal.App.4th at p. 960; *People v. Brown* (1989) 216 Cal.App.3d 596, 599.) The evidence presented at the preliminary hearing did not include any reference to the fact that either a siren was activated or that Officer Harrison wore a distinctive uniform. As a result, the conviction on this charge must be reversed and count 2 dismissed. (*Burks v. United States* (1978) 437 U.S. 1, 14-15; *People v. Hill* (1998) 17 Cal.4th 800, 848.)

Defendant remains subject to sentences on three counts. We agree with the Attorney General that defendant should be resentenced on those three counts. Defendant received a total sentence of 25 years to life consecutive to a determinate term of 2 years, 8 months. Our reversal of the count 2 judgment means the indeterminate 25 years to life sentence will be reversed. After the remittitur issues, the trial court is free to impose any sentence it deems appropriate so long as it does not exceed that previously entered at the

initial sentencing hearing. (*People v. Craig* (1998) 66 Cal.App.4th 1444, 1448, 1452; see *People v. Hanson* (2000) 23 Cal.4th 355, 367.) We agree with the trial court though, that section 654, subdivision (a) bars multiple sentencing on the weapons charges in counts 4 and 5. (*People v. Bradford* (1976) 17 Cal.3d 8, 22; *People v. Rowland* (1999) 75 Cal.App.4th 61, 64.)

[The balance of part III is deleted from publication. See post at p. 13 where publication is to resume.]

2. Defendant as the driver of the car

Defendant argues that there was insufficient evidence to support his convictions in counts 2 (evading a police officer), 4 (possession of a loaded firearm) and 5 (possession by a felon). More specifically, defendant argues there was no substantial evidence that he was the driver of the car that was involved in the police pursuit or the subsequent foot chase. Because we have reversed defendant's evading conviction under count 2 in the published portion of this opinion, we need only discuss the weapons possession charge in counts 4 and 5.

In this case, Officer Harrison testified that the traffic pursuit involved only one person in the car, the driver. Officer Harrison kept the car in his sight with the exception of a matter of seconds then saw it jog to the right of and around stopped traffic and come to an abrupt stop. When Officer Harrison reached the car, the driver got out and began to run. Officer Harrison followed on his motorcycle and then on foot. Officer Harrison ultimately tackled and handcuffed defendant. After other officers took custody of defendant, Officer Harrison went directly to the area of the bushes where the driver, who was defendant, had run and found a firearm. In addition, Officer Gillispi, who had been involved with the citation of defendant on April 17, 2001, arrived at the scene at the conclusion of the pursuit. Officer Gillispi was the responding officer on May 7, 2001,

who placed defendant in the police car and recovered the handgun. This constituted substantial evidence to support defendant's convictions on counts 4 and 5.

3. Prior serious felony conviction

Based upon his in court admissions while represented by counsel, defendant was found to have sustained two prior serious felony convictions. On appeal, he challenges the sufficiency of the evidence as to one of the two prior serious felony convictions. Defendant argues his 1997 "juvenile adjudication" for attempted robbery in Nevada does not qualify as a prior serious felony conviction pursuant to sections 667, subdivision (d)(3) and 1170.12, subdivision (b)(3).[2] As can be noted, sections 667, subdivision (d)(3) and 1170.12, subdivision (b)(3) provide a "prior juvenile adjudication" can only serve as a serious felony conviction for sentence enhancement purposes if it is listed in Welfare and Institutions Code section 707, subdivision (b).[3] Defendant correctly notes that attempted robbery is not listed in Welfare and Institutions Code section 707, subdivision (b). Only the completed offense of robbery is listed in Welfare and Institutions Code section 707, subdivision (b). Further, defendant argues that sections

---

2 Section 667, subdivision (d)(3) provides in pertinent part: "A prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentence enhancement if: [¶] (A) The juvenile was 16 years of age or older at the time he or she committed the prior offense. [¶] (B) The prior offense is listed in subdivision (b) of Section 707 of the Welfare and Institutions Code or described in paragraph (1) or (2) as a felony. [¶] (C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law. [¶] (D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code." Section 1170.12, subdivision (b)(3) provides the same.

3 Welfare and Institutions Code Section 707, subdivision (b) states in pertinent part: "(b) Subdivision (c) shall be applicable in any case in which a minor is alleged to be a person described in Section 602 by reason of the violation, when he or she was 16 years of age or older, of one of the following offenses: [¶] (3) Robbery . . . ."

667, subdivision (d)(3)(C) and 1170.12, subdivision (b)(3)(C) require that the minor have been found to be a be a "fit and proper subject to be dealt with under the juvenile court law" in order for a juvenile court adjudication to later serve as a prior serious felony conviction for enhancement purposes. Hence, defendant argues that his 1997 Nevada attempted robbery conviction cannot serve to enhance his sentence in the present case. (*People v. Garcia* (1999) 21 Cal.4th 1, 15; *People v. Superior Court (Andrades)* (2003) 113 Cal.App.4th 817, 827.)

The parties advert to certain documents which are contained in the superior court file. However, no court trial was held on the prior serious felony conviction allegations. The trial court only considered the prior serious felony conviction documents in terms of whether to exercise its section 1385, subdivision (a) power to strike one or both of the two prior serious felony conviction allegations. Rather, defendant admitted he had previously been convicted of attempted robbery and sentenced to prison in Nevada. Attempted robbery is a serious felony. (§ 1192.7, subds. (c)(19) & (39); see *People v. Acosta* (2002) 29 Cal.4th 105, 111.) We agree with the Attorney General that defendant is bound by his admissions. (*People v. Thomas* (1986) 41 Cal.3d 837, 843; *People v. Jackson* (1985) 37 Cal.3d 826, 835-836; *People v. Arwood* (1985) 165 Cal.App.3d 167, 176; see *People v. Cortez* (1999) 73 Cal.App.4th 276, 281; *People v. Guerrero* (1993) 19 Cal.App.4th 401, 407.) Although defendant claimed he had been convicted in Nevada as a juvenile, he admitted to the allegations in the information in this case. Those allegations alleged the Nevada attempted robbery conviction was a serious felony. Defendant was bound by his admissions that the 1997 Nevada prior attempted robbery conviction was a serious felony. Hence, there is no merit to his argument that the Nevada attempted robbery prior conviction finding must be set aside on direct appeal. (We note that the Nevada court records make no reference to juvenile proceedings.)

Defendant argues that under the Nevada robbery statute there is no requirement of a specific intent to permanently deprive the victim of the stolen property. Tentatively, it appears that defendant is correct in this regard. Nevada law does not require a robber to

act with a specific intent to permanently deprive the victim of his or her property. (*Hickson v. State* (1982) 640 P.2d 921, 922; *Litteral v. State* (Nev. 1981) 634 P.2d 1226, 1227-1229.) By contrast, California's robbery provisions require a specific intent to permanently deprive the victim of the property taken during the commission of the offense. (*People v. Marshall, supra,* 15 Cal.4th at p. 34; *People v. Harris* (1994) 9 Cal.4th 407, 415.) As a result, it would appear attempted robbery under Nevada law cannot serve as a serious felony. This is because attempted robbery in Nevada does not have an element required under California law--the intent to permanently deprive the victim of the property taken during the crime. (§§ 667, subd. (d)(2); 1170.12, subd. (b)(2) [4]; see *People v. Reynolds* (1991) 232 Cal.App.3d 1528, 1532 [Colorado robbery statute omitted intent to steal element of section 211].) However, we can take no action on direct appeal in this regard. Defendant's in court admissions while represented by counsel end the matter.

It may be that defendant did not receive effective assistance of counsel in connection with the decision to admit the validity of the prior serious felony as it relates to the Nevada attempted robbery conviction. It is entirely possible that defendant was never advised the Nevada attempted robbery conviction was not a qualifying offense under sections 667, subdivisions (d)(2) and 1170.12, subdivision (b)(2). It is also possible defendant had other uncharged matters which necessitated the admission in this case. In other words, there may have been tactical reasons to admit the validity of the

---

[4] Section 667, subdivision (d) provides in pertinent part: "(3) A prior juvenile adjudication shall constitute a prior felony conviction for purposes of sentence enhancement if: [¶] (A) The juvenile was 16 years of age or older at the time he or she committed the prior offense. [¶] (B) The prior offense is listed in subdivision (b) of Section 707 of the Welfare and Institutions Code or described in paragraph (1) or (2) as a felony. [¶] (C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law. [¶] (D) The juvenile was adjudged a ward of the juvenile court within the meaning of Section 602 of the Welfare and Institutions Code because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code." Section 1170.12, subdivision (b)(3) provides the same.

prior Nevada attempted robbery conviction. But on direct appeal, we can take no further action on the Nevada attempted robbery conviction. No ineffectiveness of counsel issue has been raised and there is an insufficient showing as to the advice given and its appropriateness. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267 [ineffective assistance claim are often more appropriately litigated in a habeas corpus proceeding]; *Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4 [failure to raise issue in briefs waives the issue on direct appeal].) Nothing we have held in this opinion concerning the validity of the 1997 Nevada attempted robbery conviction should be construed as an expression of views as to how we would resolve a habeas corpus petition raising issues of ineffective assistance of counsel.

B. The Trial Court's Exercise Of Its Section 1385, Subdivision (a) Discretion

Defendant argues the trial court abused its discretion in refusing to strike a prior serious felony pursuant to section 1385, subdivision (a). Because we have remanded for resentencing, we need not address this issue. We have every confidence the trial court will impose an appropriate sentence.

C. Credits

Defendant argues the trial court improperly failed to award presentence conduct credits pursuant to section 4019. We agree that defendant is entitled to presentence conduct credits but disagree with defendant's calculations. The failure to award an adequate amount of credits is a jurisdictional error, which may be raised at any time. (*People v. Karaman* (1992) 4 Cal.4th 335, 345-346, fn. 11, 349, fn. 15; *People v. Serrato* (1973) 9 Cal.3d 753, 763-765, disapproved on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1.) Defendant received an incorrect award of presentence

credits. (§§ 2900.5, 4019.) He should have received 134 days of conduct credit as well as 270 days actual credit for a total of 404 days.

D. Parole Fine

The trial court imposed a $1,000 section 1202.4, subdivision (b)(1) restitution fine. However, the trial court neglected to impose the mandatory section 1202.45, restitution fine which in this case would be in the sum of $1,000. Since defendant is subject to parole, the section 1202.45 fine should have been assessed and stayed. (*People v. Martinez* (1998) 65 Cal.App.4th 1511, 1523; *People v. Hong* (1998) 64 Cal.App.4th 1071, 1084.) Upon issuance of the remittitur, the trial court is to impose and stay the section 1202.45 fine.

[The remainder of the opinion is to be published.]

IV. DISPOSITION

Defendant's conviction as to count 2 is reversed. Count 2 is ordered dismissed. The matter is remanded for resentencing. Upon issuance of the remittitur, the superior court clerk is directed to correct the abstract of judgment to reflect defendant's presentence credits of 404 days, including 270 actual days and 134 days of conduct credit as well as the $1,000 fine imposed pursuant to Penal Code section 1202.45. The superior court clerk shall forward a corrected copy of the abstract of judgment to the Department

of Corrections. The judgment is affirmed in all other respects.

CERTIFIED FOR PARTIAL PUBLICATION

TURNER, P.J.

We concur:

GRIGNON, J.

MOSK, J.